Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____.

COLONIAL MILLING COMPANY, PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

JURISDICTION.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is printed in the record and has not yet been officially reported. The opinion and judgment were filed and entered on December 10, 1942. The statutory provision believed to sustain the jurisdiction is Section 240 of the Judicial Code (28 U. S. C. A. 347).

II.

STATEMENT OF THE CASE.

The following important questions are involved in this case:

1. Where a decision of the Processing Tax Board of Review is reached by the concurrence of three out of five Members, only two of whom concur as to the legal basis of the decision, two Members dissent, and one Member erroneously rejects evidence legally admissible, was there a finding of fact by the Board which was controlling upon the United States Circuit Court of Appeals, as expressly held by the court in the present case?

2. Does Title VII of the Revenue Act of 1936 permit a recovery of the processing tax upon an analysis of all of the transactions of the claimant during the entire tax period where admittedly with respect to certain of the transactions the claimant failed to shift the burden of the tax but where with respect to other transactions the claimant admitted that it shifted the burden of the tax and made no claim therefor, and where it further appears that during the tax period, notwithstanding the claimant's inability to shift a definitely determined amount of the tax, net profits were realized sufficient in amount to offset the taxes absorbed?

3. Is a claimant who seeks a refund of processing taxes under Title VII of the Revenue Act of 1936 required to affirmatively show that it bore the economic burden of the processing tax in addition to showing the ACTUAL extent to which it was able to shift the burden of the tax to the purchaser?

4. Where the proof shows that the petitioner shifted the entire tax in a portion of its sales but failed to do so with respect to all other sales during the entire tax period can it be said that the petitioner shifted the economic burden of the absorbed taxes because it operated during the tax period at a net profit?

5. Is it possible in a sale where the tax is admittedly shifted and a profit is made to say that the profit represents the shifting of taxes absorbed in previous, or subsequent, sales to entirely different purchasers? Can

a seller shift more than one hundred percent of the tax to a purchaser?

6. In determining whether or not the petitioner has shifted the burden of the tax to the purchaser is the petitioner entitled to include in its price structure the reasonable and normal profit of the industry before determining the question of the absorption or the shifting of the tax in the sale of its product, or should the comparison of petitioner's cost with its sales price be limited to actual cost plus the amount of the processing tax?

The foregoing questions will be further amplified in the argument.

III.

SPECIFICATION OF ERROR.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding and finding that the failure of petitioner to present invoices of and details as to the sale of 54,017 barrels of flour with respect to which it conceded that it shifted the tax entirely required the dismissal of the petition for refund upon the ground that Title VII of the Revenue Act of 1936 conditions a recovery under it upon proof that the economic burden of the tax has been borne by the claimant.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the Processing Tax Board of Review found as a fact in the present case that the petitioner failed to show that it shifted the burden of the tax with respect to the sales involving 135,400 barrels of flour, where the petitioner admitted that with respect to its remaining sales of 54,017 barrels of flour during the tax period it succeeded in shifting the burden of the tax, upon the ground that petitioner failed to offer proof from which the amount of net profits realized on such sales could be determined so that the Board might

offset *pro tanto* such net profits against the taxes admittedly absorbed in the other transactions.

3. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that petitioner failed to adduce evidence with respect to all of its transactions during the tax period but offered evidence relating only to certain isolated transactions, and that petitioner's proof therefore failed to meet the requirements of Title VII of the Revenue Act of 1936 by showing that the tax had not been shifted considering the transactions of the entire period as a whole. Petitioner's proof analyzed every transaction during the entire period and affirmatively showed a failure to shift the tax with respect to the greater portion of the transactions but admitted a shifting of the entire tax with respect to the remaining portion of the transactions. Petitioner sought no recovery with respect to the transactions where it admitted shifting the tax and the statute does not require or permit as a condition precedent to the right to recover admittedly absorbed taxes a further showing to negative net profits sufficient to offset absorbed taxes for the purpose of determining the *economic* incidence of the tax as distinguished from the *actual* shifting thereof.

BRIEF OF ARGUMENT.

Points upon Which Petitioner Relies.

The petitioner relies upon the following points in support of its claim for refund:

1. The adverse presumption established against the petitioner under the negative showing of margin averages made in accordance with Title VII, Section 907(a), is rebutted by undisputed proof of the actual extent to which the petitioner shifted to others the burden of the processing tax, as provided in Title VII, Section 907(e), of the Revenue Act:

(a) An excise tax levied upon the processing of wheat and not shifted to the grower at the time of the purchase of the wheat must be either absorbed by the processor or shifted to the purchaser by inclusion in the price of the commodity sold.

(b) A processing tax (not shifted to the grower) can *only* be shifted at the time of the sale of the processed commodity.

(c) A processing tax may be shifted in whole or in part at the time of the sale of the commodity but no more than one-hundred per cent of the tax can be shifted to the purchaser. Any sum received in excess of the entire processing tax constitutes profit and does not represent a shifting of the tax.

(d) A failure to shift the processing tax in a sale of the commodity results in a *pro tanto* absorption of the tax and creates an operating loss. Profits realized in other transactions based upon excess of sales value over cost including tax, or upon profits derived from sales of other commodities, or from operating economies such as failure or refusal to draw salaries, may offset and reduce

or eliminate previous losses due to the failure to shift the tax, but such profits do not represent a shifting of the tax.

2. The processing tax was a commodity tax levied upon each bushel of wheat upon the theory that the amount of the tax would be included in the sales price of the flour milled from such wheat and would be recovered by the processor at the time such product was sold to the purchaser. If petitioner had succeeded in shifting the tax to the purchasers in the various sales shown by Petitioner's Exhibits 10 to 31 inclusive, the petitioner's net income would have been increased by the amount of the tax shown by the evidence to have been absorbed by the petitioner in these transactions. A showing of net operating profit has no more probative effect upon the question of the shifting of the tax than a showing of a net operating loss would have upon the same question.

3. The undisputed proof shows that with respect to the transactions proven the petitioner failed to shift the tax to its purchasers in the sum of $78,663.99 taking into consideration an allowable reasonable profit of twenty-five cents per barrel of flour. Eliminating the item of profit the total tax not shifted to the purchasers amounts to $45,482.64. Allowing a minimum profit on the basis of ten cents per barrel, the amount of the tax absorbed by petitioner in the transactions proven was $59,022.64.

4. Where the proof shows an actual failure to shift the tax in whole or in part there is no room for the play of economic theories with respect to the incidence of the tax. These theories (concerning which economic authorities are in radical disagreement) are applicable only where the tax is *included* in the realized sales price, but nevertheless it is contended that the seller bore the economic burden of the tax through sales resistance, smaller volume and other factors. The proof in the present case, analyzing all of the sales during the entire tax period, indicates the extent of the actual shifting and the actual

absorption of the tax and hence the theory of economic shifting or absorption is inapplicable.

5. Title VII, Section 907(e), of the Revenue Act of 1936 conditions petitioner's recovery upon a showing by proof of the actual extent to which the claimant shifted to others the burden of the processing tax, and the requirement of a further showing with respect to the economic burden of the tax is contrary to the plain language of the statute.

6. If Title VII of the Revenue Act of 1936 is to be construed so as to affirmatively require petitioner to rebut all inference of the shifting of the economic burden of the tax, as distinguished from the actual shifting of the tax, an impossible restriction would be placed upon petitioner's right of recovery and the statute in question would be rendered void as violative of the Fifth Amendment of the Constitution of the United States.

7. The Processing Tax Board of Review has never made any adverse finding against petitioner with respect to the shifting of the tax and the learned Circuit Court of Appeals was in error to the extent that it predicated its decision upon such asumption. Two Members of the Board concurred in holding that it was incumbent upon petitioner to show that it failed to make net profits equal to the tax which it failed to shift. One Member concurred in the dismissal of the petitioner upon the entirely different ground that petitioner was not permitted to show its failure to shift the tax by an analysis of all of its transactions during the tax period. Two Members held that the petitioner was entitled to a refund of the tax under its proof.

ARGUMENT.

Petitioner concedes that the average margin established in accordance with Title VII, Section 907, of the Revenue Act as stipulated in this matter, creates a *prima facie* presumption that the tax was shifted by the claimant to others. Section 907(e) provides, however, that either the claimant or the Commissioner may rebut the presumption established by subsection (a):

> "* * * *by proof of the ACTUAL extent to which the claimant shifted to others the burden of the processing tax.*"

Petitioner respectfully submits that under the undisputed evidence in this case it has rebutted the presumption by showing:

(a) That the adverse *prima facie* average margin for the period before and after the tax was due to changes in factors other than the tax, such adverse average margin being due to a large non-recurring loss sustained during the fiscal year ending June 30, 1932, in closing out retail stores, by selling petitioner's product at a sacrifice;

(b) By positive and undisputed proof showing actual costs and actual sales value of flour sold, the actual extent to which the claimant shifted the processing tax to the purchasers of flour, thereby establishing beyond controversy that it shifted the entire tax in sales involving a total of 54,017 barrels of flour but failed to shift the entire tax with respect to sales involving 134,500 barrels of flour.

The presumption established by the *prima facie* showing, like all other presumptions, is subject to rebuttal by actual proof and is destroyed in the present case by such proof. In discussing the nature of this presumption the

Supreme Court of the United States in *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337, 81 L. Ed. 1143, said:

> "The stated presumptions are rebuttable. If they work adversely to its interests, petitioner will have ample opportunity to prove all the rebutting facts. Section 907(e) provides that either the claimant or the commissioner may rebut the presumptions 'by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax.' There follows a detailed provision as to what such proof may include. But that provision is not exclusive. It is expressly stated that the proof in rebuttal shall not be limited to what is thus described. Petitioner urges that the statute requires that this proof shall be of the 'actual extent' to which the burden of the tax has been shifted, and recurs to the arguments as to the inherent impossibility of producing such proof. What we have already said with respect to that argument is applicable in this connection. We do not think that Congress was attempting to require the impossible. The permissible, and we think the true, construction of Section 907(e) is that the words '*actual* extent' are used in contradistinction to the *presumed* extent, according to the *prima facie* presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged either under Section 907(a) or otherwise."
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> 301 U. S., p. 35.

The presumption is destroyed first by the undisputed evidence which showed that the adverse average margin established in accordance with the statute was due to changes in factors other than the tax. In 1928 and 1929 the petitioner established about twenty-five retail stores throughout the Southeast and undertook to market its

flour directly to the consumer through these retail stores. This proved to be a disastrous business venture and petitioner closed out all of these stores during the two-year period immediately preceding the tax period, resulting in tremendous operating losses due to a sale of the flour at sacrifice prices. These losses are reflected in petitioner's operating statement for the year ending June 30, 1932, which showed a net loss of $68,504.06 against a small net operating profit for the preceding year and for the succeeding years and during the tax period (R. 125-126).

Petitioner's records were not kept in such a method as to segregate the specific losses due to this non-recurring situation.

The invalidity of the *prima facie* presumption is further destroyed by the undisputed showing that petitioner's average margin, established on the same basis as that provided in Section 907(a) but for a period including the entire time it had been in business since 1925 through 1937, *omitting the tax period,* discloses an average margin of 56.777 cents per bushel as against an average margin during the tax period of 43.905 cents per bushel, indicating that the petitioner failed to shift the burden of the tax to the extent of $108,518.20 (R. 122-124; Petitioner's Exhibit 3).

The two-year period immediately preceding the tax period and the six-months period immediately following thereafter were admittedly abnormal business periods and the proof shows a chaotic condition prevailed in the milling business generally. If the test of the shifting of the tax burden is to be based upon average margin between costs and sales value, it is respectfully insisted that this average margin should be computed during a period of normal business conditions rather than during a fractional period of petitioner's business life, and no fairer test could be provided than the average margin during the entire business life of the petitioner, which, in the present

case, began in 1925. Such a period includes the admittedly normal business years of 1926, 1927 and 1928, as well as the abnormal business periods of the depression years immediately following 1930. Considering both the normal and the abnormal years, the proof shows without dispute that petitioner, in the usual and customary conduct of its business, was receiving an average net margin of slightly more than fifty-six cents per bushel and that during the tax period this margin was reduced to an average of approximately forty-four cents per bushel.

The only conclusion that can be drawn from these undisputed facts is that petitioner's average margin was reduced by the imposition of the tax and the absorption of a part thereof by the petitioner due to its inability to completely shift the tax to the purchasers of its flour. Under this proof the petitioner is entitled to a refund of $108,518.20.

In the present case the petitioner has not only rebutted the *prima facie* presumption in the manner shown above but has established by uncontradicted proof the actual extent to which it shifted the processing tax to those who purchased its product from time to time, as expressly authorized by Section 907(e).

The processing tax with respect to wheat was 30 cents per bushel of wheat processed for domestic consumption. The petitioner purchased this wheat, processed it into feed and flour, paid the tax with respect to each bushel made into flour, and sold the flour to its customers. It endeavored in every sale to sell its product for such price as would permit it to recover its entire cost including the processing tax and a reasonable profit. The proof discloses that the sale of flour was so competitive that its prices varied from day to day and were dependent entirely upon individual bargaining between the petitioner and the prospective purchaser. There was no uniformity in prices. Under these conditions the petitioner at some times was able to sell its flour for a price which permitted

it to recover the entire processing tax and, in some instances, a reasonable profit in addition thereto. In other instances the price was beaten down so low by competition that petitioner was obliged to sell its product at a price which did not permit a reasonable profit or even the recovery of its actual out-of-pocket expenses, including the tax. Quite clearly, in these latter instances, the petitioner was unable to shift the burden of the tax in whole or in part to the purchaser of its flour. No better proof than this could be adduced to show "the actual extent to which the claimant shifted to others the burden of the processing tax," as expressly authorized by Section 907(e). As pointed out by the United States Supreme Court in *Anniston* v. *Davis*, 301 U. S. 337, 81 L. Ed., at page 1153:

> "* * * When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled."

It being conceded that the petitioner has paid the full tax to the Government under an invalid statute and that this tax was levied upon wheat by the bushel (and not upon petitioner's annual operations at a loss or a profit), and petitioner having shown by undisputed evidence that with respect to certain definite designated sales of flour milled from wheat upon which it had paid the tax the price received therefor was not sufficient to reimburse it for its costs, it automatically follows as a matter of course that petitioner is entitled to recover the tax paid with respect to the bushels of wheat contained in these respective sales even though it might develop that with respect to other transactions involving other bushels of wheat upon which the tax was paid the petitioner had no claim because in these latter transactions it either shifted

the burden of the tax to the purchaser or was unable to prove the contrary.

The petitioner is under no duty other than to present fully all the facts pertaining to the question of the shifting of the burden of the tax, and relief can be denied only when these facts show that the burden has been shifted from the claimant to others.

Anniston Manufacturing Company v. *Davis*, 301 U. S., at p. 352, 81 L. Ed., at p. 1153.

It must be conceded that the processing tax on wheat, if shifted at all, must be passed on to the purchaser of petitioner's flour at the time the flour is sold. In the absence of evidence showing the net result of the actual sale transaction evidence of a general nature, such as net operating profits or losses or average margins determined over various test periods, might be considered as a general indication of whether or not the tax was shifted, but conclusions based upon such general evidence completely disappear in the face of undisputed evidence relating to specific sales.

It is conceded by all economists that excise taxes, such as the processing tax, can be shifted in only two ways—either backward to the grower of the wheat by a deduction from the purchase price, or forward to the purchaser of the flour by an addition to the sales price, and that this shifting of the tax must take place either at the time the wheat is purchased or at the time the flour is sold.

"Shifting takes place through a change in prices. The shift may be *forward*, in which case the taxpayer bearing the impact adds the tax to the price of the goods he sells. Thus, a tax imposed upon the manufacturer of cigarettes may be shifted to the wholesaler, by the wholesaler to the retailer and from the retailer to the consumer, all in the form of prices higher than those prevailing before the tax.

"Shifting is thought to take place most commonly along the line of exchanges by which a commodity

is moved from the producer of raw materials to the final consumer. But shifting may also be *backward* in the form of a reduction in the price of raw materials purchased by the processor. A processing tax imposed on butter or pork may thus result in lower prices paid for milk and hogs by the processor to the farmer. In fact, it may even occur by passing a tax on to factors of production other than raw materials. For example, it is conceivable that an employer may relieve himself of his taxes by cutting wages. Ordinarily the employer can do this only to the extent that the tax gives him an excuse for driving a harder bargain. Occasionally, however, as in the case of certain taxes imposed by the Social Security Act, the demand for labor may be reduced as a result of taxation, so that unemployment and lower wages may follow as a fairly likely consequence."

Financing Government, by Harold M. Groves, Published by Henry Holt and Company, Inc., 1939, at page 123.

The above author, who has been prominently identified with New Deal tax legislation, further argues the difficulty of shifting the tax in a buyers' market during a depression period such as existed during the present case:

"Probably the prevailing theory of incidence gives too little weight to the strategic factors in the price bargain. These have to do with the bargaining power of buyers and sellers. This power may depend upon the knowledge and resources of the bargainers, and is particularly enhanced by 'collective bargaining.' It may also depend considerably upon the prevailing phase of the business cycle when the tax is levied.

"Taxes are more easily shifted in a sellers' than in a buyers' market; more easily during booms than depressions. When times are good and buyers are clamoring for goods, as they did during the World War, sellers have high bargaining power. They may seize upon a tax as an excuse for adding substantially to the prices of goods they sell. This is the sellers' market. On the other hand, during a severe depres-

sion the tables are turned. Now they eagerly scan the horizon for possible buyers to take surplus goods off their shelves. Prices are failing and any delay in unloading their stocks may involve heavy losses. Under these circumstances—a buyers' market—the sellers are likely to absorb new taxes rather than run any chance of losing their much-coveted orders."

Financing Government, by Harold M. Groves, Published by Henry Holt and Company, Inc., 1939, at page 141.

Shifting a tax can mean only one thing—passing the tax on to a purchaser by including it in whole or in part in the purchase price.

"If a tax is to be shifted, some vehicle must be used; and the only one available is price."

Principles of Public Finance, by Hunter and Allen, Published by Harper & Brothers, 1940, at page 211.

The author last quoted, in discussing the shifting and incidence of taxes of this nature, further says:

"Fiscal authorities may levy a tax upon a particular individual which he pays. This may end the transaction. On the other hand, he may in some manner transfer this tax burden to someone else; the latter may transfer it to another, and so on for a number of times. The different individuals actually have had to make payments because of the tax levy, yet they have not really felt the burden of it because they have recouped themselves from someone else. In many cases people engage in this process of tax transference entirely unconsciously because the tax may be embodied in the price which they pay or receive. The burden, however, must finally rest somewhere; a point will be reached where there is no possibility or opportunity for more transfers. This process of transferring a tax burden from one individual to another is 'shifting'; the point where the burden of the tax finally rests is its 'incidence.' "

Principles of Public Finance, *supra*, at page 237.

It is also true, of course, that over a tax period of approximately two years a processor may be able to shift the tax in some instances and unable to shift the tax in other instances due to changing conditions of competition and supply and demand. This is particularly true during a period of depression. Alfred G. Buehler, Associate Professor of Public Finance in the Wharton School of Commerce and Finance of the University of Pennsylvania, has dealt with this situation in a recently published book.

> "Buying, selling, prices, and costs are affected by general business conditions, along with tax shifting, for these changes alter supply and demand. In periods of rising prices and prosperity, it is easier for most enterprises to sell at prices equal to, or greater than, costs than it is during falling prices and depression. Taxes can, therefore, be shifted more easily with other costs during prosperity than during depression. Now taxes which are imposed at a time of business crisis or depression are especially difficult to shift. Seasonal changes also modify shifting, for in some seasons certain goods are in demand and can be sold at a profit, but in other seasons certain goods can be sold only at a loss, if at all. In the same way, secular trends have an influence upon tax shifting, as they may occasion fundamental changes in supply and demand. But because secular changes operate more slowly than other changes, it should be easier to discount them in advance. As an average proposition, of course, sellers must obtain prices which, after allowing for changing profits and losses, will cover their necessary costs, including taxes, or they will go out of business."
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> Public Finance, by Alfred G. Buehler, Published by McGraw-Hill Book Company, Inc., 1940, at page 354.

Where the Government has received taxes under an invalid statute it has no right to retain any of these funds but it does have the right to require the one claiming a refund to show that he bore the burden of the tax to the extent of the refund claimed. Whether or not he

bore the burden of the tax is determined by whether the tax was shifted to the purchaser in the sale of the commodity with respect to which the tax was paid. If the tax was so shifted then the purchaser is entitled to the refund unless he in turn has shifted the tax to others. If the tax was not shifted to the purchaser then the processor who paid the tax would be entitled to the refund. As between the processor who paid the tax and the Government the sole question to be determined is whether or not and to what extent the tax was included in the sale price of the product. If the refund statutes in the present case were construed to deny a refund because of a net operating profit where the proof showed that with respect to the actual sale of the product the petitioner was unable to shift the tax to the extent of the amount of refund claimed, such statutes would be unconstitutional as clearly violative of due process of law. This was pointed out by the Supreme Court of the United States in *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 384, 78 L. Ed. 859, from which we quote as follows:

> "We do not perceive in the restriction any infringement of the process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them. Statutes made applicable to existing claims or causes of action and requiring that suits be brought by the real rather than the nominal party in interest have been uniformly sustained when challenged as infringing the contract and due process clauses of the Constitution.
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> "The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed

> on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said: 'This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action.' "
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> *United States* v. *Jefferson, etc.*, 291 U. S., at p. 402, 78 L. Ed., at pp. 871-872.

In the present case the undisputed proof shows that the respondent holds money paid to it by the petitioner on 135,400 barrels of wheat which it milled into flour and that in the sale of this flour the amount received by the petitioner was less than the total cost of the flour including the tax and therefore that petitioner, with respect to these sales, failed to shift the burden of the tax to the amount of the refund claimed. This amount, eliminating all items of profit, is $45,482.64. Including a reasonable profit of twenty-five cents per barrel this amount would be $78,663.99. And computed on the basis of a reasonable profit of ten cents per barrel this amount would be $59,022.64.

Erroneous Theory of the Circuit Court of Appeals.

The Circuit Court of Appeals held that petitioner's evidence with respect to transactions involving 135,400 barrels of flour showed that it had *actually* failed to shift the burden of the tax to its purchasers to the extent of $45,482.64 and that to this extent the adverse presumption from the marginal computation was rebutted. The Court said:

> "We regard the figures submitted by petitioner as showing by reasonable approximation the profits or losses from the sales of 135,400 barrels, and so far as they went, as evidence of the actual extent to which the petitioner failed to shift to his vendees the burden of the processing tax in these particular transactions. The words 'actual extent' in section 907(e) are used in contradistinction to the extent to which the petitioner is presumed to have shifted to others the burden of the tax according to the *prima facie* presumption arising out of the adverse margin to which the proof in rebuttal is addressed. *Anniston Mfg. Co.* v. *Davis, supra.* The presumption of the statute is rebuttable and the evidence submitted properly bore upon the question as to whether the petitioner had shifted the tax. The discrepancies arising out of differences in size of sacks and their corresponding costs, in size of the barrel, whether containing 196 or 192 pounds, the number of bushels of wheat required to make a barrel of flour, and other variations brought out in cross-examination, are not such as to require that the figures of actual cost made up from petitioner's records be disregarded."
> (R. 280-281.)

Notwithstanding the foregoing finding of fact, the Circuit Court of Appeals held that petitioner's claim must be rejected because it failed to file detailed proof showing how much profit it made in the remaining transactions involving 54,017 barrels of flour with respect to which petitioner conceded it had shifted the entire tax burden to the purchaser. The Court's precise reason for this holding was stated in the opinion as follows:

> "* * * The statute conditions a recovery under it upon proof that the economic burden of the tax has been borne by the claimant."
> (R. 281.)

In support of the foregoing statement the Court relied upon the Eighth Circuit decisions in *Cudahy Packing Co.* v. *United States,* 126 F. 2d 429, and *United*

States v. *H. T. Poindexter & Sons Merchandise Co.*, 128 F. 2d 992.

The *Cudahy* case reversed a summary judgment rendered by a District Judge under Rule 56 of the Federal Rules of Civil Procedure. The petition and affidavit simply averred that plaintiff had not shifted the burden of the tax by billing any amount of floor stocks tax to any vendee *as a separate item*, by adding to or including in the prices of its product *any identifiable amount* of floor stocks taxes, or by reducing the price paid for any commodity. The court expressly called attention to the fact that *this Court*, in *Anniston Mfg. Co.* v. *Davis, supra*, "did not directly pass upon the competing interpretations before us," but concluded that this Court in the *Anniston Mfg. Co.* case had in mind the test of the economic burden as a determining factor where it was impossible to adduce testimony with respect to the actual shifting of the tax. After commenting upon the inherent difficulty of determining the economic incidence of the tax, the court said:

> "We shall not discuss plaintiff's contention that the economic burden test is unconstitutional, since we may not assume impossibility of proof."

It will be seen from the foregoing that Cudahy only contended *at the most* that the floor stocks tax was not *an identifiable part* of its price structure. *It did not contend that the realized sales price of its products was less than its manufacturing cost plus the floor stocks tax.* It is apparent from the court's opinion that if the proof had shown that the selling price was less than the manufacturing cost plus the tax the economic burden of the tax would be upon the seller to the extent that the sales price failed to reimburse the seller for the manufacturing cost plus the tax.

Applying these principles to the present case the proof clearly shows that petitioner bore the economic burden of the tax with respect to sales involving 135,400 barrels

of flour but shifted the burden of the tax with respect to the remaining sales involving 54,017 barrels of flour. Cudahy failed to analyze its transactions by separating its sales and historically tracing the shifting or non-shifting of the actual burden with respect to each sale. It presented its computation on an over-all basis. The cause was remanded for the purpose of requiring Cudahy to offer proof as to the *actual* shifting of the burden. It would seem, under the court's opinion, that a showing of proof such as made by the petitioner in the present case would necessarily result in a refund to the extent of the actual absorption of the tax.

The opinion of the same court in *United States* v. *H. T. Poindexter & Sons Merchandise Co., supra,* delivered three months later, clearly indicates that the so-called play of economic burden which the court had in mind would have no application under the proof in this case. In the *Poindexter* case the claimant conceded that upon payment of the tax it increased its selling price and *actually sold* its goods at the *increased* price. The court said:

> "* * * There is no argument or contention that the plaintiff did not raise the prices. * * * Plaintiff neither alleged nor attempted to show that the amount to which it increased its selling prices was insufficient to cover its former selling prices of the articles plus the amount of the tax assessed and paid in respect to them, or that it did not realize normal profits after the tax was paid."

The court concluded:

> "The concrete definitely controlling consideration therefore is the established fact that the inventory valuations and the prices were raised coincident with the tax, and by the collection of the increased prices the tax was passed on."

In the present case the petitioner attempted to add the tax to its price structure so as to shift the tax to the

purchaser but because of competition petitioner could not dispose of its flour on this basis but sold it in the open market for whatever price it would bring, and furnished a detailed analysis of sales showing an absorption of the tax to the extent of $45,482.64. The following proof offered by petitioner is undisputed in the record:

"Q. Now, I will ask you, subject to the condition that you will subsequently introduce these specific transactions, but in order to get a general view of the situation, purely to lay grounds, out of this total of 189,417 barrels of flour sold during the tax period, in how many instances, stated in number of barrels, did you find that you were successful in obtaining a price which reimbursed you 100 per cent for the processing tax?

A. 54,017 barrels.

Q. In other words, in the sale of 54,017 barrels, you ascertain that the price was sufficiently large to include your entire cost, and the processing tax?

A. Yes.

Q. And are you making any claim for a refund in connection with the sale of those 54,017 barrels?

A. No.

Q. In how many instances, stated in number of barrels, did you find that the price was not large enough to include in whole, the processing tax?

A. 135,400.

Q. *Those together, however, constitute every transaction and every sale during the entire tax period?*

A. That is correct."

(R. 133-134.)

"Q. State whether or not you have analyzed the sales of those 54,017 barrels in the same manner that you have analyzed the other sales and have found, on the basis of the same analysis, that in those latter sales the price was sufficient for you to recover 100 per cent of the processing tax on the wheat that was processed in that 54 thousand some-odd barrels of flour.

A. I have.

Q. And your claim, therefore, relates only to the sales involving the 135,400 barrels of flour, in which, according to your analysis, the tax was borne entirely or in part by you?

A. That is right.

Q. State whether or not the exhibits which you have filed show each actual transaction, together with your analysis, showing the amount of processing tax paid to the Government with respect to the wheat ground into flour and sold in each transaction, and also the extent to which that tax was recovered by you in the sale of that flour, and the extent to which it was passed on to the purchaser.

A. May I have that repeated?

(The question was read.)

The Witness: They do."

(R. 165-166.)

The Decision in the Instant Case Is Contrary to the Decisions of Other Circuits and the Supreme Court of the United States.

In the case of *C. B. Cones & Son Mfg. Co.* v. *United States,* 123 F. 2d 530, the Seventh Circuit dealt with a refund claim of floor stocks tax on cotton. Cones admitted a general increase in prices but contended these increases were not due to the payment of the floor stocks tax. The court approached the problem by saying:

"* * * The question at issue must be determined on the basis of what was actually done."

After construing the opinion of this Court in *Anniston Mfg. Co.* v. *Davis, supra,* the court allowed the refund, saying:

"Applying such pronouncement to the instant situation, we do not see how it can be legally contended that plaintiff has obtained relief through the shifting of its burden merely by increasing its selling price so as to permit recovery of the actual market value of its product. The position of the defendant and the

decision of the court below would require the plaintiff to forego the recovery of a sufficient portion of the increased value of its product to make room for the inclusion of the tax. It is our opinion that such a requirement results in an actual injury to the plaintiff, as real as though he were being deprived of his property for less than its fair market value."

123 F. 2d, at p. 534.

The Sixth Circuit, shortly prior to the present decision, in *Andrew Jergens Co.* v. *Conner,* 125 F. 2d 686, laid down the following principles with respect to the recovery of the tax:

"The statute in question is not to be so narrowly construed. It plainly provides that no overpayment of tax shall be refunded, unless the manufacturer shows that he has not included the tax in the price of the article with respect to which it was imposed. It is incumbent on appellants as a prerequisite to recovery of the taxes to show not that appellee had by some illegal method secured these funds but that the appellants had a better right to them than the appellee. It is also the duty of appellants to prove, as against the appellee, their right in equity and good conscience to recover the tax. In other words, they must show that they have not been unjustly enriched by commingling with the cost price of the articles sold, the taxes in question, or that they did not conceal the taxes in question in the prices at which their products were sold so as to impose the burden of the tax on their customers."

125 F. 2d, at p. 690.

Petitioner submits that its proof in the present case comes squarely within the above stated requirements.

On the question of the actual burden as distinguished from the so-called economic burden, Mr. Justice Murphy, of this Court, in the recent case of *Wilson & Co.* v. *United States,* 311 U. S. 104, 85 L. Ed. 71, said:

"Title VII conditions payment of refunds upon proof that the claimant *actually* bore the burden of

> the tax sought to be refunded or that he unconditionally repaid it to his vendee who bore the burden. Since petitioners do not allege satisfaction of these conditions it is plain that they do not claim under Title VII. Indeed, they disown any attempt to bring their claims within its provisions."

The learned Circuit Court of Appeals in the present case attached controlling significance to the fact that petitioner, while admitting that it shifted the entire burden of the tax in certain sales and therefore claimed no refund, failed to file invoices and actual figures showing these admitted transactions so that the court could determine how much *profit* the petitioner made in addition to the recovery of the entire tax. The court said:

> "* * * It admitted that in the sale of 54,017 barrels it shifted the burden of the tax by including the tax in the price received plus a profit of 25 cents per barrel, but claimed that in the sale of the remaining 135,400 barrels it absorbed the tax either in whole or in part. The invoices and the actual figures covering the transactions in the sale of the 54,017 barrels of flour were not introduced in evidence." (R. 279).

The court was of the opinion that if the amount of profit made in these transactions had been shown it might have been sufficient to offset the amount of processing taxes absorbed by the petitioner in its various other transactions. The court therefore rested its decision upon the proposition that in selling a barrel of flour for a profit it was possible for the petitioner to shift *to the purchaser* of that barrel of flour not only the entire tax paid with respect to the wheat contained in it but in addition to shift the tax borne by the petitioner in either a previous or a subsequent transaction where the price realized failed to cover the manufacturing cost and the tax. This apparently is what the court meant by shifting the *economic burden* of the tax.

Implicit in this statement is the assumption that one may shift more than one hundred percent of a tax burden in the sale of a commodity to a purchaser.

The complete fallacy of this theory was recently pointed out by the Circuit Court of Appeals for the Second Circuit in the case of *E. Regensburg & Sons* v. *Helvering*, 130 F. 2d 507, from which we quote:

> "We do not forget that Section 902(a) declares that a successful claimant must prove that he 'has not been relieved' of, 'nor shifted such burden * * * through reduction of the price paid'; and if that means that it is a complete answer to every claim that the cost of the raw material has fallen by the full amount of the processing tax, of course the claimant here must lose. But the section does not mean that for reasons which we have already suggested. Unless the decline in price was caused by the tax, such an interpretation would defeat the general purpose of the act, which was to reimburse those who had paid and who had not indemnified themselves indirectly. A fall in the price of the raw material which would have occurred, tax or no tax, is not such an indemnity; *the claimant's loss through the tax cannot be said to have been made good by a profit which he would have enjoyed quite as certainly,* if there never had been any tax. Indeed, so to construe the act would expose it to some of those constitutional dangers which the opinion in *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143, was at pains to show that it must avoid."
>
> 130 F. 2d, at p. 510.

It is, of course, true that manufacturers might be successful in some transactions in shifting the burden of the tax and also making a net profit. This net profit does not represent the shifting of the burden of tax in either previous or subsequent transactions. Where the tax was paid on the *bushel of wheat,* and each sale involved a barrel of flour made from *such wheat,* the tax was either absorbed or shifted in the transaction in which the specific flour was sold.

A construction of Title VII of the Revenue Act of 1936 so as to condition the right of recovery upon a determination of the economic burden, or other theoretical consideration of the tax incidence, would (as pointed out by the Second Circuit in the *Regensburg case, supra*) render the Act violative of the Fifth Amendment to the Federal Constitution under the decision of this Court in *Anniston Mfg. Co.* v. *Davis, supra.* In the *Anniston* case, this Court said:

> "* * * *When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed, or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled.* There is ample room for the play of the statute within the range of possible determinations. Impossibility of proof may not be assumed. It cannot be doubted that the requirement has appropriate and valid effect in placing upon the claimant *the duty to present fully all the facts pertaining to the question of the shifting of the burden of the tax and in denying relief where the facts justify a conclusion that the burden has been shifted from the claimant to others.* When the facts have been shown it becomes the duty of the Board of Review to make its determination according to the legal rights of the claimant. That is the necessary import of the provision for judicial review, giving authority to the reviewing court to modify or reverse the decision of the Board 'if it is not in accordance with law.' Findings that can properly be made upon the evidence must thus support a decision according to legal right. And, as we have seen, the reviewing court, and finally this Court, may direct the Board 'to enter any designated judgment' to which the claimant is constitutionally entitled and the Commissioner must refund the amount thus determined to be due."

Mr. Justice Stone, in the dissenting opinion in *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570, 75 L. Ed.

1277, has pointed out that economists generally disagree in their theories with respect to the shifting of the burden of taxation and that this is true even where admittedly the price paid by the seller includes the tax, saying:

> "* * * With this assumption economists would not, I believe, generally agree. Many hold that whether the burden of any tax paid by the seller is actually passed on to the buyer depends upon considerations so various and complex as to preclude the assumption *a priori* that any particular tax at any particular time is passed on."[1]

Mr. Justice Cardozo, in his dissenting opinion in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054, indicated the danger of conditioning rights upon conflicting economic theories, saying:

> "* * * It is not the function of a court to make itself the arbiter between competing economic theories professed by honest men on grounds not wholly frivolous. *Otis* v. *Parker*, 187 U. S. 606, 609, 47 L. Ed. 323, 327, 23 S. Ct. 168. Responsibility for economic wisdom has been laid upon the legislature. There is finality in its choice, even though wisdom may be lacking, unless choice can be found

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[1]Bastable, Public Finance (3rd Ed.), pp. 372-337, 387, 388, 548, 577, 578, 588; Brown Economics of Taxn., pp. 95, 96, 134, 135, 326-328; Bye & H., Applied Economics, pp. 453-456; Ely, Outlines of Economics (5th Ed.), p. 794; Hobson, Taxn. in New State, pp. 52-56; Lutz, Public Finance, pp. 317-319; Marshall, Principles of Economics (6th Ed.), pp. 413-415; Nicholson, Elements of Political Economy, pp. 456-460; Seligman Shifting & Incidence of Taxn. (5th Ed.), pp. 218, 219, 253, 254; Shoup, Sales Tax in France, pp. 322-327; Proceedings, National Tax Asso., 1907, p. 432; **id.**, 1920, pp. 175, 176, 179, 212, 266; **id.**, 1922, pp. 108, 109; **id.**, 1923, pp. 297, 298; **id.**, 1924, pp. 307, 314, 347-349, 355; **id.**, 1929, pp. 271, 406, 407; Bulletin, National Tax Asso., 1923-1924, p. 170; **id.**, 1929-1930, p. 260; National Industrial Conference Board, General Sales or Turnover Taxn., pp. 52-54. Others, without discussion of those factors which affect and often obscure the fact of shifting, hold the contrary: Comstock, Taxation in Modern State, p. 121; Bulletin, National Tax Asso., 1923, 1924, p. 174.

to be so void of rationability as to be the expression of a whim rather than an exercise of judgment."[2]

The Underlying Equitable Principle.

If net profits during the tax period should be adopted as the basis for rejecting a refund upon the theory that a showing of net profits indicated a shifting of the economic burden of the tax, then by the same token a mere showing of a net loss during the tax period would necessarily require a refund to the extent of the net loss—a principle that has been uniformly repudiated in the construction of statutes conditioning the right of recovery to a showing by actual proof that the burden was not shifted in the sale of the product.

The offsetting of absorbed taxes by net profits in other transactions involves a complete misconception of the equitable principle which controls the right of refund of taxes erroneously paid to the Government but with respect to which the taxpayer has suffered no loss because he included the tax in the price for which he sold the product and thereby shifted the burden to the purchaser. Under such circumstances the Government admits that a refund of the taxes should be made but the taxpayer is not the person who should receive it and that in equity it belongs to the purchaser who paid a price which allowed the taxpayer to recover his entire cost including the tax.

In the present case the taxpayer seeks only to recover that part of the tax fund held by the Government

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[2]See "Windfall Tax and Refund Provisions of the Revenue Act of 1936," 50 Harvard Law Review 477. See interesting discussion between Secretary Wallace and Senator Bailey, "Hearings Before Committee on Finance" on H. R. 12395, 74th Congress, 2nd Session (1936), where Secretary Wallace (at page 863) said:

"Mr. Wallace: The economists seem to think that in the case of wheat and cotton the nature of supply and demand is such that very little of the tax would have been passed back to the public in the case of those two products, but in the case of hogs there is a little different situation."

which the taxpayer paid with respect to the wheat processed in the flour and sold for a price which was insufficient to shift the burden of the tax to the purchaser. Manifestly in these transactions the money held by the Government equitably belongs to the taxpayer and not to the purchaser of the product.

The argument that profits made in subsequent sales should be used to offset taxes absorbed in previous sales is fallacious on its face. *If* petitioner in the transactions for which refund is claimed had received a price sufficient to shift the burden of the tax its profits would have been *increased* by the amount of the refund which is claimed. In the present case the tax period was from July 9, 1933, to March 1, 1935. The wheat processed during this period cost $854,215.99. The sales value of petitioner's product during the tax period was $1,430,264.39 (R. 66-67). Petitioner operated on a fiscal year beginning July 1st and ending June 30th. For the fiscal year ending June 1, 1934 (which included approximately the first year of the tax period), petitioner had a net profit of $5,614.84 before depreciation, and a net loss after depreciation of $1,488.13 (R. 210-211). For the year ending in June, 1935, petitioner had a net operating profit before depreciation of $23,048.18. This latter operating profit did not occur during the tax period, which ended March 31, 1935, but resulted solely from the release of imported processing taxes *accruing after* the termination of the tax period, and therefore such net earnings do not reflect profits of the petitioner during the tax period (R. 213-218).

Eliminating the profits accruing after the tax period, petitioner's net operating profit before depreciation was approximately $3,000. Its total operating profit before depreciation during the tax period was less than $9,000, and it operated at a net loss during the entire tax period, taking depreciation into consideration.

If the item of profit is eliminated from petitioner's calculations with respect to those transactions where re-

fund is sought and a minimum recovery of $45,482.64 is allowed, the net earnings will be approximately sufficient to pay the dividends on petitioner's preferred stock and the 6% dividend on its common stock (R. 118) without allowing any compensation to certain of petitioner's executive officers (R. 119).

If petitioner had been successful in recovering the tax in the sales involving the 135,400 barrels of flour in question its net income during the tax period would have been increased $45,482.64, and if in addition to recovering its actual cost in these sales petitioner had been successful in obtaining a profit of twenty-five cents per barrel its net income during the tax period would have been increased $78,663.99. The loss of this net income is admittedly due to petitioner's absorption of the tax in the transactions involving 135,400 barrels of its flour. *The purchasers of these barrels of flour are admittedly not entitled to recover the tax from the Government because the price which they paid for the flour failed to include the tax to the extent of the amount of the refund claimed.* It must result therefore, both in logic and in equity, that the funds which the Government admittedly wrongfully collected and to which it has no right, belong in equity to the petitioner and the effect of the refund will be to restore to the petitioner's gross income the *exact amount* which it would have received had it not absorbed the tax.

Conclusion.

For the foregoing reasons petitioner earnestly urges the Court to grant the writ of certiorari in this cause since it involves a legal question of great importance in the construction of a Federal statute, the determination of which question by this Court will resolve a doubt growing out of the decisions of the various Circuit Courts,

and the case also involves an interpretation of a Federal statute which is probably contrary to the decisions of this Court.

Respectfully submitted,

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